United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1330

To be argued by
CHERYL M. SCHWARTZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1330

UNITED STATES OF AMERICA,
Appellee,

—against—

ARIEL FERNANDEZ-TORRES,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Ariel Fernandez-Torres appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Constantino, *J.*), entered March 8, 1974, which judgment convicted appellant, after a jury trial, of knowingly possessing with intent to distribute on two occasions, approximately one-eighth of a kilogram of heroin (Counts One and Three), and of knowingly distributing the heroin on both occasions (Counts Two and Four), in violation of Title 21, United States Code, Section 841(a)(1).

Appellant was sentenced to concurrent terms of eight years on the first two counts and six years on the second two counts, with a five year special parole term to follow. Appellant is currently serving his sentence.

Appellant presents these claims on appeal: (1) that he was denied a constitutional right to personally examine, during a pre-trial hearing, fugitive reports of the Bureau of Narcotics and Dangerous Drugs; (2) that he was denied

due process when the Court did not specifically rule on the alleged issue of prejudice resulting from a delay in his arrest following his dealings with the Government undercover agent; (3) that the Court inhibited full development of appellant's cross-examination of a Government witness and summation and, further, failed to charge the jury regarding the relevancy of the pre-arrest delay; and (4) in a supplemental brief filed by substituted counsel, that appellant was denied effective assistance of counsel at his trial.

Statement of the Case

1. The Trial

(1)

On June 8, 1971, the appellant telephoned Santiago "Jimmy" Valdez, a government informant cooperating with the Bureau of Narcotics and Dangerous Drugs (hereinafter "BNDD") and asked Valdez if he knew anybody who wanted to buy heroin (T-16).* The next day Valdez met with BNDD Special Agents Carter and McElroy and made arrangements to introduce Agent Carter to appellant (T-18). Valdez and Agent Carter met appellant later that same day at Dave's Blue Room, a bar on 98th Street in Brooklyn (T-17-19). Valdez introduced Agent Carter, representing him as "Art from Atlanta," to appellant, whom Valdez called "Ray" (T-20). Appellant agreed to sell an eighth of a kilogram of heroin for $3700 (T-21), but insisted on delaying the transaction because he did not know Agent Carter well enough (T-23). Agent Carter gave Valdez the $3700 which Valdez then transferred to appellant in a car in front of the bar (T-23-24). Later that evening, appellant called Valdez and instructed him to go to the El Rancho Bar in Brooklyn (T-26).** Thereafter,

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* Numbers preceded by "T" refer to minutes of trial transcript.

** Agent McElroy was present when Valdez received the call (T-69, 70).

when Valdez arrived at the El Rancho Bar, he called appellant and was told that the heroin was in a garbage can outside 27 Jefferson Street, Brooklyn (T-28). Valdez and Agent Carter drove to 27 Jefferson Street (T-28, 71) and Agent Carter looked for the package of heroin in a garbage can at that address (T-29, 71-72). Agent Carter went first to one garbage can and a voice recognizable as appellant's told Carter that it was the wrong garbage can (T-72). Carter then went to the correct garbage can and took out a shopping bag containing the heroin (T-72, 74).

About six weeks later, on July 20, 1971, Carter, identifying himself as "Art from Atlanta," the name by which appellant knew him, called appellant at his residence. Appellant instructed Agent Carter to go to the Oasis Bar in Brooklyn and call him from there (T-78).

Agent Carter proceeded to the Oasis, in which several other agents were present, and called appellant (T-78-79). Appellant arrived approximately twenty minutes later and sat down at a table with Agent Carter (T-79). Appellant agreed to sell Agent Carter another eighth of a kilogram of heroin for $3700 (T-80). They discussed larger quantities and appellant said he could get Agent Carter "as much as [he] wanted" (T-81). Agent Carter attempted to give him the $3700 but appellant insisted that he did not want to take money from him directly (T-82). Appellant indicated that he was not in the bar alone and told Agent Carter to put the money on the little ledge above the telephone in the telephone booth adjacent to their table (T-82). He assured Agent Carter that as soon as he left the booth someone would go in and take the money (T-82-83). Appellant then told Agent Carter to call him at six o'clock that evening (T-83).

Pursuant to appellant's direction, Agent Carter went to the telephone booth, pretended to make a call and left the

$3700, wrapped in a brown bag, on the ledge (T-83). He went back to his table and observed a woman, later identified to him as Martha Velez, enter the phone booth, stay a few minutes, and then leave the bar (T-83). Appellant then left the bar, heading in the same direction as Martha Velez (T-84). As soon as appellant left, Agent Carter checked the ledge in the phone booth and ascertained that the package was gone (T-84).

Agent Carter had a telephone conversation with appellant sometime thereafter. Appellant said that his source had gotten lost on the way to his place, that he did not have the heroin as of yet and asked for a number where he could reach Agent Carter (T-85). Agent Carter obliged and gave him an undercover number at the office of the Bureau of Narcotics and Dangerous Drugs (T-86). At 10:30 that evening, appellant called Agent Carter at that number and instructed him to go to the Chalpardo Bar in Brooklyn where he would be further contacted (T-86).

Agent Carter proceeded to the bar where he received a telephone call from appellant (T-87). Carter was told that the package would be found in the right rear of a yellow tow truck parked in front of the bar (T-87). Appellant asked Carter to call him for further transactions, and Agent Carter agreed to call in a couple of weeks "if everything goes well" (T-87).

Agent Carter left the bar and located the yellow tow truck. He found the brown bag in the location described by appellant (T-88). The bag contained white powder later identified as heroin (T-74).

Later in 1971, Agent Carter again contacted appellant to arrange a third purchase of heroin (T-89, H-16)* but the sale was not consummated (H-25-6).

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* Numbers preceded by "H" refer to minutes of the November 20 hearing transcript. The hearing was continued on November 27; references to the transcript of this second day of the hearing are designated as "H— of November 27."

Martha Velez testified that she had been living with appellant during June and July, 1971, and that she was the woman in the bar on July 20 who had removed the brown package from the phone booth as appellant had directed her, and that she later gave the package to appellant (T-125-128). She also stated that appellant told her that the package contained money but that he did not open it in her presence, and she had no knowledge of what the money was for (T-128). On cross-examination, Ms. Velez admitted to using heroin during July 1971 (T-135).

(2)

Appellant, testifying on his own behalf, stated that he had no clear recollection of his activities on June 9, 1971 and July 20, 1971. He denied any participation in the sale of heroin to Agent Carter. Appellant testified that he could not be specific about his whereabouts on the dates in question, and stated, "I don't remember even where I was three months ago" (T-149).

2. The Pre-Trial Hearing

At a pre-trial hearing on November 20 and 27, 1973, appellant moved to dismiss the indictment on the ground that the delay from the time of the crime until the time of his arrest (October 5, 1973) violated his right to a speedy trial and impaired his ability to prepare a defense.

The complaint was filed on February 7, 1972, and a warrant for the arrest of the appellant was duly issued on that date. Appellant was arrested on October 5, 1973.

At the hearing, Special Agent McElroy of the Bureau of Narcotics and Dangerous Drugs, testified about the efforts the Bureau had made to locate appellant. Approximately fifty pages of Bureau agents' reports detailing these efforts were received in evidence (H-21).

Between July 20, 1971, and February 7, 1972, the agents made several attempts to locate appellant, and the informant, Valdez, attempted to contact appellant at their request (H-16). On or about February 7, 1972, the Bureau decided that appellant was unavailable and obtained a warrant for his arrest (H-16). On February 9, 1972, BNDD agents unsuccessfully attempted to apprehend appellant at his last known address (H-16).

On February 16, 1972, agents of the BNDD arrested appellant's accomplice, Martha Velez, and questioned her about appellant's whereabouts (H-30-31 of November 27). She stated that she had not seen appellant for some time (H-31 of November 27).

From that time until the arrest, a total of twenty-three to twenty-five BNDD agents in New York and Puerto Rico, including members of the Special Fugitive Group, tried to locate appellant (H-17). Their efforts included questioning of appellant's acquaintances, neighbors and parents as to his whereabouts, checking bank and motor vehicle records, maintaining phone and mail checks, and checking his previous address and place of work (H-19 and H-6 of November 27).

Appellant testified on his own behalf at the hearing. He contended he had remained in the New York area and never took any steps to avoid prosecution during the time between the sales of heroin and his arrest (H-30, 40 of November 27). On cross-examination, however, he admitted that he is also known as "Ray Fernandez" and has cards with both names (Ray Fernandez and Ariel Fernandez-Torres) (H-44-45 of November 27). He was living with Martha Velez at the time of her arrest (H-47 of November 27) and during the twenty-month period which followed, he lived in at least eight separate places in Brooklyn and New Jersey (H-51 of November 27). At no time did he notify anyone of a forwarding address (H-55-56 of November 27).

He had no phone in his name at any of these residences (H-56 of November 27).

During the course of the hearing, appellant's counsel was denied permission to allow appellant to examine the BNDD reports detailing the search for appellant (H-22-25). The Court's ruling, however, did not prevent appellant's counsel from discussing the contents of the reports with appellant.*

At the close of the hearing, the Court denied appellant's motion and found that the Government had exercised due diligence in attempting to find and arrest appellant (H-68-69 of November 27). Although the Court did not specifically rule on the issue of whether appellant had been prejudiced by the pre-arrest delay, the Court did find that none of appellant's rights, upon which the argument of prejudice had been based, were violated (H-69 of November 27).

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* The record of the afternoon session of November 20 is inexplicably incomplete, as noted in appellant's first brief, page 5. Part of the argument on this issue, which could shed light on the Court's rationale, is missing from the record. In brief, however, the Court believed that it was unnecessary, in view of the confidential character of the reports, for appellant to personally examine them.

ARGUMENT

POINT I

Each of appellant's claims arising from the "issue" of the delay in his arrest is without merit.

As in the District Court, appellant has doggedly clung to a claim which, stripped down, amounts to nothing more than the proposition that his short memory, particularly with respect to narcotics transactions, immunizes him from prosecution. Giving full breadth to his testimony and his legal claim, it would appear that the Government's right to prosecute appellant expired when it did not arrest him within three months of his transactions with Agent Carter.* That main claim, which serves as the unarticulated major premise for so much of appellant's first brief, is without merit. Thus, equally without merit are the defendant's contentions which appellant has advanced concerning the alleged failure of the District Court to explicitly state that appellant had suffered no legally recognizable prejudice from the delay (Point II of appellant's first brief),** and the denial to him, though not to his trial counsel, of access to the confidential fugitive reports of the Bureau of Narcotics and Dangerous Drugs (Point I of appellant's first brief). Appellant also hangs his objection to the Court's charge on identification testimony on the convenient two-year delay peg (Point III(c) of appellant's first brief).

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* Appellant indicated that his memory is so bad that he cannot even remember whom he talked with or where he was three months ago (See transcript p. 42 of the hearing on November 27, 1973, and T-149-150).

** The Court mentioned the issue of prejudice when delivering its ruling (H-69, Nov. 27) and obliquely ruled on the issue by finding that the Government exercised due diligence in declaring appellant a fugitive.

The Supreme Court has specifically declined to extend the Sixth Amendment speedy trial protections to the period prior to arrest. *United States* v. *Marion*, 409 U.S. 307, 321 (1971). The Court stated however, that, depending upon the circumstances, dismissal may be required by the Fifth Amendment Due Process if actual and substantial prejudice accrues to the defendant. *Ibid* at 324-5. In the instant case, appellant failed to prove his claim of actual prejudice, based on his short memory. Indeed, the record indicates that despite the appellant's protests to the contrary, he remembered past events and places, particularly when it seemed helpful to his case.* The defendant failed to establish the material pre-indictment prejudice that is necessary for dismissal under the Due Process clause of the Fifth Amendment.** See, *United States* v. *Schwartz*, 464 F.2d 499 (2d Cir. 1972). In all events, as this Court stated in *United States ex rel. Solomon* v. *Mancusi*, 412 F.2d 88 (2d Cir. 1969), at 91, " . . . a more particularized showing of prejudice than a mere allegation of the dimming of the memory is required."

The appellant's initial claim was so unfounded and frivolous that to allow him access to he fugitive reports would have been purposeless even if, technically, access should have been given. Compare, *Jackson* v. *United States*, 250 F.2d 897 (5th Cir. 1958).

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* Appellant remembered (1) his living on Jefferson Street during June and July, 1971 (H-27 of Nov. 27); (2) seven other places of residence, their general description and the order in which he moved to them (H-27-37 of Nov. 27); (3) the last date he was in Puerto Rico (H-30 of Nov. 27); (4) his employment history from 1971 (H-31-33 of Nov. 27); (5) the circumstances of the arrest of Martha Velez (H-38 of Nov. 27), etc. See also T-151-152.

** Insofar as government's intention to delay is considered an issue in speedy trial cases, it should be noted that in the instant case the testimony of Agent McElroy and the approximately fifty pages of fugitive reports, which simply supplemented McElroy's testimony that the government was not lax in its efforts to locate appellant.

Appellant also argues that the delay in his arrest affected the identification testimony of the witness at trial (Point III (c) of his first brief). Yet, nothing in the record indicated that the two-year delay had impaired the ability of the witnesses to identify appellant. All of the witnesses were certain that the appellant was the "Ray Fernandez" who had taken part in the sale of heroin to Agent Carter in June and July, 1971. Appellant was not entitled to the requested charge on the effect of the two-year delay in identification testimony because there was no basis for it in the evidence adduced at trial. *United States* v. *Strassman*, 241 F.2d 784, 786 (2d Cir. 1957).

POINT II

Appellant was not unduly restricted in cross-examining the witness Velez.

Appellant contends that his inability to cross-examine Martha Velez as to the voluntariness of her statements to agents after her arrest impaired the opportunity to impeach her credibility.

On direct examination, Ms. Velez testified that on July 20, 1971, she had removed from the telephone booth a package placed there by Agent Carter and that she later gave the package to appellant, as he had directed (T-125-128). She also testified that she had been arrested on February 16, 1972, in connection with this case, and that the complaint against her was subsequently dismissed (T-128).* At the time of her testimony at the trial, there

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* On cross-examination, the witness stated that she had been questioned by agents after her arrest. At that time she denied any knowledge of the July 20, 1971, transaction, but subsequently stated that appellant had directed her to pick up a package for him (T-135-136). These subsequent statements were first elicited during cross-examination of the witness.

were no charges pending against her in any case, and she stated that no threats or promises had been made to her by the Government with respect to her testimony or the disposition of her case (T-128-129).

On cross-examination, defense counsel questioned the witness at length about the circumstances of her arrest, including the number of agents who had arrested her (T-132), the time of arrest (T-132), where she was taken (T-134), whether she was nervous (T-134), how long she was held for questioning (T-135), when and under what circumstances she made a statement implicating appellant (T-136-137), and whether the agents knew that she was an addict (T-138). After continuing and repetitious cross-examination on this issue, the Court sustained the Government's objection to this questioning.

Almost two years transpired between Ms. Velez's statements to the agents and her testimony at trial. The voluntariness of Martha Velez's statements at the time of her arrest was an issue that was remote to the trial testimony. There were no pending charges against Ms. Velez, and no evidence of any self-interested motive in Ms. Velez to testify for the Government. If the statements to the agents had been coerced, she had ample opportunity to change her statement at trial, where no such coercion was evident. Counsel was afforded ample opportunity to pursue this line of cross-examination; the Court merely prevented further repetition of such questions. In short, the Court properly exercised its broad discretionary power to limit the scope of cross-examination. *United States* v. *Owens*, 263 F.2d 720, (2d Cir. 1959). See also, *United States* v. *Brown*, 482 F.2d 1226 (8th Cir. 1973, limiting cross-examination of an informant). Certainly, in this instance, the Court did not commit an abuse of discretion.

POINT III

The Court properly limited defense counsel's summation with respect to identification testimony.

Appellant claims that his challenge to the Government's identification testimony was an essential element of his defense. He argues that the lapse of time between the observation of defendant in June and July, 1971, and the testimony at trial in November, 1973, considered together with the brief nature of both meetings with appellant, made the identification by the informant Valdez unreliable. Appellant complains that Valdez failed to "point the accusing finger at Mr. Fernandez" and that the Court improperly sustained a Government objection to this characterization of Valdez's testimony during the defense summation.

Appellant was apparently arguing that Valdez was not certain that the man at the defense table was the man he saw on June 9, 1971. He attempted to prove this argument by drawing inferences from the facts that Velez and Carter identified appellant but Valdez did not. The transcript clearly indicates that Valdez knew appellant,* and it was not necessary for the Government to ask the perfunctory questions as to whether "You see Mr. Fernandez in the courtroom" (T-13, 16, 17, 18, 25, 27, 29, 59, 60).

Because this argument misrepresented the evidence, it was properly excluded even under the standards of *United States* v. *Sawyer*, 443 F.2d 712 (D.C. Cir. 1971), which the appellant cites in his argument. See also *United States* v. *Quinn*, 467 F.2d 624 (8th Cir. 1972), *cert. denied*, 410 U.S. 935 (1973).

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* Valdez indicated that he had appellant's telephone number (T-26); he knew that appellant lived at 27 Jefferson Street (T-27); and he observed that appellant was about forty pounds lighter in weight at the time of the offense (T-60).

POINT IV

Appellant was afforded the effective assistance of counsel.

In a very nearly scurrilous argument, appellant's substituted appellate counsel has maintained that appellant's assigned trial counsel was incompetent. Of course, not so incompetent that new counsel has bypassed the opportunity to adopt and incorporate the arguments in trial counsel's brief to this Court, but certainly incompetent, ineffective and even "stupid" (Supplemental Brief, p. 10) at the trial.*

The Government will not belabor the point: Treating appellant's argument on its own terms, it is quite clear from the entire record in this case that trial counsel did the best he could under very difficult circumstances.** The measure of that effort was that the jury deliberated as long as it did (over five hours) in a situation where the Government's evidence was simply overwhelming. Appellant's specific claim concerning Mr. Lilly's "failure" to move for a *Wade-Simmons* hearing is absurd for there had been no pre-trial photographic or lineup identification of appellant. Mr. Lilly's "failure" to object to the few lead-

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* Substituted counsel, happily not a fanatic when it comes to consistency, graciously remarks that: "We [appellant and counsel] are *not* claiming that Mr. Lilly is generally incompetent" (Supplemental Brief, p. 12, n.) (emphasis in original).

** The Government almost hesitates to compare the competency of Mr. Lilly's representation of appellant with the incompetency of counsel in such cases as *Mosher* v. *LaVallee*, 351 F. Supp. 1101 (E.D.N.Y. 1972), *aff'd* 491 F.2d 1346 (2d Cir. 1974) and *United States ex rel. Johnson* v. *Vincent*, 370 F. Supp. 379 (S.D.N.Y. 1974), for fear of implicitly suggesting that Mr. Lilly's representation even approaches the conduct of those cases. In short, the Government believes that, far from deserving condemnation, trial counsel was an able and professional attorney throughout the trial.

ing questions propounded to the witness Valdez demonstrated his skill as a trial lawyer and not his ineptitude because, given Valdez's poor memory, difficulty with the language, and reluctance, leading questions were appropriate. See *Antelope* v. *United States*, 185 F.2d 174 (10th Cir. 1950); *Rotolo* v. *United States*, 404 F.2d 316 (5th Cir. 1968). No purpose would have been served, therefore, by making a needless objection. Thirdly, while the Government does not condone the statement that Mr. Lilly made when, referring to Valdez's testimony in a different case, he gratuitously remarked: "On that occasion the defendant was acquitted" (T-56), it must ruefully concede that Judge Costantino's immediate repremand more than likely only served to highlight the statement and, of course, the obvious inference that Mr. Lilly wished the jury to draw. Certainly, the entire event could not, as new counsel suggests, "have discredited appellant's defense in the minds of the jurors" (Supplemental brief, p. 10).

Finally, as to undercutting appellant's defense in his summation, defense counsel had little choice in his strategy. He had to discredit the damaging testimony of Martha Velez, and an attack on her life-style (T-179-80) was one of the few means of doing so. Furthermore, appellant's own testimony about what he could and could not recall was so confusing and unconvincing (T-149-152, 159-163) that for counsel to insist in summation that appellant was not present at the transactions would have totally ill-served appellant's interests. Mr. Lilly, in his summation, attempted to portray the evidence in a light most favorable to his client and most convincing to a jury. His efforts on behalf of appellant were commendable even if in vain.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

October 16, 1974

DAVID G. TRAGER,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

Michael Mulqueen being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 18th day of October 1974 he served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Jesse Berman, Esq.
351 Broadway
New York, N. Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Michael Mulqueen
MICHAEL MULQUEEN

Sworn to before me this

18th day of October 1974

Irene Blake

IRENE B. COHEN
Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975